

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0155

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF: ANNETTE B. BRUDNOWSKI,

PETITIONER-RESPONDENT,

V.

JOHN M. BRUDNOWSKI,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County:
WILLIAM M. MC MONIGAL, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. John Brudnowski appeals from an order awarding child support to Annette Bichler. The parties were formerly married and have two children. The issue is whether the trial court erroneously exercised its discretion by awarding support to Bichler that exceeds the amount due her under the child support formulas authorized in § 767.25(1j), STATS., and set forth in WIS. ADM.

CODE § HSS 80.04. We conclude that the trial court properly exercised its discretion, and we therefore affirm.

The children spend fifty percent of their time with each parent, in an alternating week arrangement. At the time of the child support hearing in April 1995, Brudnowski earned approximately \$35,000 per year and Bichler received \$10,500 per year in disability payments. In June 1996, just before the trial court issued its decision, Bichler became employed at a salary of \$17,000 per year.

Under the formula for shared-time custody arrangements set forth in WIS. ADM. CODE § HSS 80.04(2), Brudnowski owed Bichler support of \$184 per month up to June 1996, and \$123 per month thereafter. However, the trial court determined that application of the formula:

results in insufficient income to assure the minor children of a reasonable and consistent standard of living.... The household incomes would be too disparate and result in significant differences in the standard of living enjoyed by the children in each of the respective households. Further, based on the financial statements provided by each of the parties for the same periods, Ms. Bichler would be unable to cover even basic household costs[,] leaving the children's needs unfunded. Therefore, the Court rejects the shared custody formula in HSS 80.04 because such formula fails to provide adequate support for the minor children.

The court applied its own formula instead, under which Brudnowski paid \$437 per month until June 1996 and \$371 per month thereafter. Brudnowski contends on appeal that the trial court erred by departing from the standard formula without a "formal request" from Bichler. He also contends that the evidence offered by Bichler does not support an award in excess of the formula.

Section 767.25(1j), STATS., states that "[e]xcept as provided in sub. (1m), the court shall determine child support payments by using the percentage

standard.” Section 767.25(1m) provides that the court may modify the formula award, upon request by a party, upon finding by the greater weight of the credible evidence that use of the percentage standard is unfair to the child or to any of the parties. In making this determination, the trial court may consider numerous factors, including the financial resources of the children and the parents, the needs of the parties, awards of substantial periods of physical placement to both parents, and the best interests of the children. *Id.* Although the percentage standard is presumptive, whether to deviate from it based on the factors set forth in § 767.25(1m) is discretionary. *See Luciani v. Montemurro-Luciani*, 199 Wis.2d 280, 294-95, 544 N.W.2d 561, 566-67 (1996). The trial court properly exercises its discretion if it examines and relies on relevant facts, applies a proper standard of law, and arrives at a reasonable determination using a demonstrated rational process. *Id.* at 294, 544 N.W.2d at 566.

The matter was properly before the court on Bichler’s request for increased support. At the beginning of the April 19, 1995 hearing, Bichler’s counsel expressly requested that the court use its discretion to augment Bichler’s award under the percentage standard “in order to create some degree of fairness.” Brudnowski’s comments at the hearing and the documents he prepared and brought to the hearing plainly show that he knew that its purpose was to litigate the issue identified by Bichler’s counsel. His argument that some other, more formal request was necessary is without merit. Both parties and the trial court were fully aware of the disputed issue raised on Bichler’s behalf.

The facts of record support the trial court’s determination. The disparity in the parties’ income speaks for itself, as does Bichler’s difficulties in supporting herself and two children half of the time on the income she received both before and after her employment commenced. The custody agreement

provided that the children would stay with each parent in alternating weeks. Under these circumstances, the court reasonably determined that it was in the children's best interest to maintain some consistency in their standard of living from week to week. The court stated:

The children move back and forth between each parental household. It is imperative that the children enjoy a standard of living not only equivalent to that which they would have enjoyed absent the divorce, but a standard of living as similar as possible between each parental household. To do otherwise, would be grossly unfair to the children or cause them, over time, to favor one household over the other solely because of the convenience of living.

Those were reasonable factors to consider within the framework of § 767.25(1m), STATS., and justify the award of additional support to Bichler.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

